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**NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS**



IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION THREE

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| THE PEOPLE,<br><br>Plaintiff and Respondent,<br><br>v.<br><br>GABRIEL CERVANTES VALENCIA,<br><br>Defendant and Appellant. | B301084<br><br>Los Angeles County<br>Super. Ct. No. KA095355 |

APPEAL from orders of the Superior Court of Los Angeles County, Robert M. Martinez, Judge. Affirmed.

Goldstein Legal Office and Elana Goldstein, under appointment by the Court of Appeal, for Defendant and Appellant.

No appearance for Plaintiff and Respondent.

In 2012 a jury convicted defendant and appellant Gabriel Cervantes Valencia of robbery, possession of a firearm by a felon, and dissuading a witness by force or threats. On the robbery count, the jury found true an allegation that a principal personally used a firearm within the meaning of Penal Code section 12022.53, subdivisions (b) and (e)(1).[1] The jury found not true an allegation that Valencia personally used a firearm in the robbery. As to all three counts, the jury found Valencia had committed the crimes to benefit a criminal street gang.

The facts were these[2]: Valencia and a confederate robbed Danielle M. late one night in August 2011. Danielle was sitting in a parked car waiting for a friend. A van drove up and parked, facing her car. Two men got out. They ordered Danielle to throw her belongings out of the car and into the street. One of the men displayed a gun in his waistband. A witness testified at trial he had seen Valencia take a black semiautomatic handgun from under the hood of the van. One of the men hit Danielle on the back of the head with a gun. The men took Danielle's purse, money, credit cards, and driver's license. One of the men warned Danielle not to tell anybody because they had "her information." Valencia was an Azusa 13 gang member.

At the conclusion of a later bench trial, the court found true the allegation that Valencia had suffered a prior strike conviction in 2002 for dissuading a witness. That prior constituted both a strike and a serious felony prior under section 667, subdivision (a)(1). The trial court denied Valencia's motion for a new trial

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1 References to statutes are to the Penal Code.

2 We take these facts from our opinion affirming Valencia's conviction. (*People v. Valencia* (Jan. 29, 2014, B246514) [nonpub. opn.] (*Valencia I*).)

and sentenced him to 28 years and four months in the state prison. The court chose the robbery count as the principal count. The court imposed the upper term of five years, doubled because of the strike, plus ten years for the firearm enhancement, plus five years for the serious felony prior. On both the felon-with-a-gun count and the dissuading count, the court imposed one-third the midterm, doubled because of the strike, to be served consecutively to the robbery count. The court struck the gang enhancement as to all three counts.

On appeal, Valencia challenged the sufficiency of the evidence only as to the dissuading count. We concluded substantial evidence supported the jury's verdict and affirmed Valencia's conviction (correcting his presentence credits). (*Valencia I.*)

Nearly four years later, the California Department of Corrections and Rehabilitation (CDCR) sent a letter to the trial court pointing out a sentencing error. CDCR noted the law required the court to impose the full middle term of two years (doubled)—not one-third the midterm (doubled)—on the witness dissuading count. The trial court had Valencia brought from state prison for resentencing.

At the resentencing hearing in March 2018, the court resentenced Valencia to four years on the dissuading count, fully consecutive to the robbery count. That resentencing added two years to Valencia's sentence. Valencia asked the court about Senate Bill No. 620 (SB 620), which had taken effect January 1, 2018. SB 620 gave trial courts discretion to strike firearm enhancements under section 12022.53, subdivision (h) "in the interest of justice . . . at the time of sentencing." The statute provides, "The authority provided by this subdivision applies to any resentencing that may occur pursuant to any other law."

(§ 12022.53, subd. (h).) Neither the court nor defense counsel seemed to be aware of the new law.

Valencia again appealed. On November 27, 2018, we vacated Valencia's sentence and remanded the case for the trial court to exercise its discretion under SB 620 to strike—or to decline to strike—the firearm enhancement imposed at Valencia's original sentencing. (*People v. Valencia* (Nov. 27, 2018, B288982) [nonpub. opn.] (*Valencia II*).)

Back in the trial court on remand, Valencia made a motion to waive his right to counsel and represent himself. (See *Faretta v. California* (1975) 422 U.S. 806.) The court granted the motion. The court explained to Valencia several times that the proceedings on remand were of "limited scope"—to determine whether "the court can find circumstances in the interest of justice" to strike the firearm enhancement. Valencia confirmed he understood.

Over the course of the next six months, Valencia moved for several continuances. In the meantime, on January 1, 2019, Senate Bill No. 1393 (SB 1393) took effect. That bill amended sections 667, subdivision (a), and section 1385, subdivision (b), to allow trial courts to strike or dismiss a serious felony prior for sentencing. (Stats. 2018, ch. 1013, §§ 1-2; *People v. Garcia* (2018) 28 Cal.App.5th 961.) Like SB 620, SB 1393 applies to all cases that were not final when it took effect. (*Garcia*, at p. 973.)

In May 2019, Valencia filed motions under SB 620 and SB 1393 to strike his firearm enhancement and his serious felony prior, respectively. Valencia wrote he had "gained a great deal of respect for the 'law' and its complexities" in his years in custody and had remained "felony[-]free" in prison. (Underscoring omitted.) As to the firearm enhancement, Valencia argued the witnesses who testified about the gun use were addicted to methamphetamine and his counsel should have hired "an expert

in psychology, drugs [*sic*]." In June 2019, Valencia filed another motion entitled "Motion For: In The Interest Of Justice [Ex Parte]," citing SB 620, SB 1393, and *Sanchez* (apparently referring to *People v. Sanchez* (2016) 63 Cal.4th 665). Valencia wrote he wanted "to get back to [his] loved ones," including his daughters, and he would not participate in gang activity if released. Valencia also filed a motion for trial transcripts, which the court granted.

Even though the trial court repeatedly had explained to Valencia that the proceedings on remand were limited to whether the enhancements should be stricken, he filed 15 additional motions, including requests for appointment of drug, gang, police practices, and "digital forensics" experts, a request for an investigator to interview witnesses and photograph the crime scene, a *Pitchess* motion[3], discovery motions, and a motion "To Compel Disclosure of Information Relevant To Selective/Vindictive Prosecution Claim," a "Notice For: Retrial, citing newley [*sic*] Enacted case: People v. Sanchez," a "nonstatutory motion to dismiss," citing section 1424.5 (which provides for disqualification of prosecutors who have withheld exculpatory evidence), and three motions citing section 141 (which mandates punishment for officers and lawyers who falsify evidence).

On August 22, 2019, the trial court conducted a lengthy hearing on all of Valencia's motions. On each motion, the court asked Valencia if he had anything to add to his pleadings. At first Valencia said, "I really don't have much other to say other than what the law has already stated under it." The court

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[3] *Pitchess v. Superior Court* (1974) 11 Cal.3d 531.

inquired, "Specifically, do you want to add why it would be in the interest of justice for the court to strike that prior?"

Valencia responded, "I strongly believe it's beneficial for the court because the sentence was—is real long . . . [a]nd I am just not the same person that I was when I first came to jail where, you know, I have really, you know, did a lot of reflecting. . . . [¶] [I]t would highly be in the interest of justice, Your Honor, the sooner that I could get out, then, you know, I could start work and fixing my life versus getting out at an older age where I would have to rely on the state to take care of me. You know, I am a hard-working man, and it would be beneficial for my family as well—my daughters."

As for his SB 620 motion, Valencia said, "I understand that the jury found the allegations true. But they could have seriously made a mistake on that. There is no firearm in evidence. There is none of that. There is no proof of use as far as any injuries . . . . And there was just a whole lot of just words thrown around of gun use and dissuasion when none of it was supported by any real fact." Valencia continued: as for the victim being hit in the head with a gun, there were no "medical reports or anything of that nature where the victim could have bumped their head somewhere," and it was "all real vague and not in fact."

The prosecution opposed the motions, arguing that Valencia had not taken any responsibility for his actions or "expressed any remorse whatsoever."

The court denied both motions. The court noted it had discretion but that discretion "is not unlimited" but is governed by the interests of justice. The court observed that Valencia's five-year prior was for the same crime: dissuading a witness. The court stated the wish of Valencia or his family members "to have his sentence reduced" "in and of itself [was] not promotion of the interest of justice." As for the SB 620 motion,

the court said, "From the evidence received, it appears that defendant's co-perpetrators were there to collect money from one of the complaining witnesses [referring to the man for whom Danielle was waiting] [that] had been owed through drug transactions. He acted in concert with that co-perpetrator, and the [firearm] allegation was found to be true." The court concluded that the interests of justice would not be served by striking the gun enhancement or the serious felony prior; the court therefore denied both motions.

After hearing argument on each of Valencia's other motions, the court denied each as untimely and beyond the scope of the hearing, noting some of the issues raised could and should have been raised before verdict or on appeal.

Valencia appealed and we appointed counsel to represent him. After examining the record, counsel filed an opening brief raising no issues and asking this court independently to review the record under *People v. Wende* (1979) 25 Cal.3d 436.[4] Counsel notified Valencia that he could file a supplemental brief within 30 days. On February 14, 2020, Valencia filed a supplemental brief.

We review a court's discretionary decision to dismiss or strike a sentencing allegation under section 1385 for abuse of discretion. (*People v. Carmony* (2004) 33 Cal.4th 367, 373; *People v. Pearson* (2019) 38 Cal.App.5th 112, 116 (*Pearson*).) The party attacking the sentence bears the burden clearly to show the sentencing decision was irrational or arbitrary.

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[4] Counsel also filed a request for judicial notice, asking us to take judicial notice "of [our] own file" in *Valencia II*, specifically the amended abstract of judgment, the reporter's transcript of the original sentencing hearing in 2012, and the reporter's transcript of the 2018 resentencing hearing. We grant the request for judicial notice.

(*Pearson*, at p. 116.) In the absence of such a showing, we presume the trial court acted to achieve legitimate sentencing objectives, and we will not set aside its discretionary determination to impose a particular sentence. (*Ibid.*) A court does not abuse its discretion unless its decision was so irrational, arbitrary, or capricious that no reasonable person could agree with it. (*People v. Clancey* (2013) 56 Cal.4th 562, 578; *Carmony*, at p. 377; *People v. Downey* (2000) 82 Cal.App.4th 899, 909-910.)

We see no abuse of discretion here. The trial court considered all of Valencia's arguments in his written pleadings, as well as his oral argument at the hearing. As the court noted, the serious felony prior Valencia asked the court to strike also was for dissuading a witness. In this case, Valencia again dissuaded a witness: he and his fellow robber (or, at a minimum, Valencia's fellow robber in Valencia's presence) warned Danielle not to tell anyone about the crime, reminding her they had her personal information. As for the gun enhancement, whether it was Valencia's confederate or Valencia himself who displayed the gun in his waistband and then hit Danielle in the head with it, Valencia acted in concert to force Danielle to surrender her property, under threat of being harmed with a gun. The court's orders denying Valencia's motions were squarely within the bounds of its broad discretion. (See *Pearson*, *supra*, 38 Cal.App.5th at p. 118.)

As for Valencia's supplemental brief, he appears still to be laboring under the misapprehension that our remand for resentencing encompassed any and all issues in his case. He is mistaken. The sole issue on remand was whether the court should strike the firearm enhancement and—after SB 1393's effective date—whether the court should strike or dismiss the serious felony prior. Accordingly, Valencia's contentions that

his due process rights were violated by *Brady*[5] violations and the court's denial of "a hearing for his motion for Retrial,"[6] and that the court should have appointed an investigator for him on remand are misplaced.

We have examined the entire record, and we are satisfied that Valencia's counsel has fully complied with her responsibilities and that no arguable issues exist. (*People v. Kelly* (2006) 40 Cal.4th 106, 109-110; *People v. Wende* (1979) 25 Cal.3d 436, 441.)

**DISPOSITION**

We affirm the trial court's denial of Gabriel Cervantes Valencia's motions under SB 620 and SB 1393.

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EGERTON, J.

We concur:

LAVIN, Acting P. J. DHANIDINA, J.

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5 *Brady v. Maryland* (1963) 373 U.S. 83.

6 Valencia cites a section "100.06." The Penal Code contains no such section; we cannot discern what statute Valencia is trying to cite.